

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**ELOY SAUCEDA**

Claimant

VS.

**THE BOEING COMPANY - WICHITA**

Respondent

AND

**AETNA CASUALTY & SURETY**

Insurance Carrier

AND

**WORKERS COMPENSATION FUND**

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) Docket Nos. 186,953 & 198,379  
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**ORDER**

Both respondent and claimant request review of the Award entered by Administrative Law Judge John D. Clark dated August 7, 1995. The Appeals Board heard oral arguments in Wichita, Kansas on December 13, 1995.

**APPEARANCES**

The claimant appeared by his attorney, James B. Zongker of Wichita, Kansas. The respondent and its insurance carrier appeared by their attorney, Eric Kuhn of Wichita, Kansas. The Workers Compensation Fund appeared by its attorney, James R. Roth, of Wichita, Kansas. There were no other appearances.

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board and the stipulations of the parties are set forth in the Award.

**ISSUES**

The Administrative Law Judge awarded claimant permanent partial disability benefits based upon an 11 percent functional impairment rating to the body. The claimant requested review of that finding and contends claimant is entitled to benefits for a work disability. On the other hand, respondent contends claimant sustained two separate

injuries and is, therefore, entitled to an award for scheduled injuries only. Respondent also requested review of the Judge's finding that the Workers Compensation Fund had no liability in the proceeding. Therefore, nature and extent of disability and Fund liability are the only issues now before the Appeals Board on this review.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons set forth below, the Administrative Law Judge's Award should be affirmed.

(1) Claimant started working for the respondent in 1986. In June 1993, claimant was working in the hand finishing department where he used hand power tools to sand sheet metal, aluminum and steel parts. That month claimant's job was slightly modified when he was given a heavier sander to operate and required to sand for the entire workday. After this job modification, claimant began to simultaneously experience pain in both wrists, arms and elbows. Despite his worsening symptoms, claimant continued to work until October 23, 1993.

Claimant received medical treatment from board-certified orthopedic surgeon J. Stanley Jones, M.D. Dr. Jones initially diagnosed right carpal tunnel syndrome and an inclusion cyst on the left wrist. In June 1994, the doctor performed a right carpal tunnel release which, unfortunately, did not resolve claimant's symptoms to any significant degree. Claimant declined surgery to his left hand when the surgery on the right did not provide much relief.

In October 1994, after claimant recuperated from the right carpal tunnel release surgery, Dr. Jones restricted claimant from operating vibratory tools, repetitive gripping and grasping, working in cold environments and lifting greater than 30 pounds. Later that month claimant returned to work for the respondent in the same department doing a similar job. Respondent placed claimant in an accommodated position where his job duties were alternated. The accommodated job position would allow claimant to sand and debur parts for two hours and then for the next two hours file documents, deliver paperwork, highlight documents and perform light housekeeping chores. However, it appears this job was both outside the work restrictions Dr. Jones had placed upon claimant during that period and beyond claimant's capabilities.

Despite these accommodations, claimant experienced additional symptomatology and returned to Dr. Jones who found claimant had increasing symptoms of carpal tunnel syndrome, epicondylitis and the start of right shoulder impingement. Dr. Jones then restricted claimant from using his right arm in any manner. In an attempt to accommodate that restriction, respondent then required claimant to check in all of his power tools and directed claimant to debur parts with his left hand. Claimant's supervisor, Byron Wheeler, testified that although the deburring task required only light pressure, claimant was afraid he would not be able to properly debur the parts because he was not left handed and was also afraid he would injure the left arm as badly as the right. Because claimant did not

attempt to perform the deburring job with his left hand, claimant was given medical leave and sent home in January 1995.

Dr. Jones believes claimant has sustained an 8 percent functional impairment to the right wrist and a 5 percent functional impairment to the left wrist. Although he acknowledges that claimant has signs of entrapment neuropathy and other symptoms suggestive of left carpal tunnel syndrome, Dr. Jones did not diagnose carpal tunnel syndrome on the left. However, he testified that his functional impairment rating to the left arm would increase to 8 percent resulting in a 10 to 12 percent whole body functional impairment rating if he included ratings for the left carpal tunnel findings.

At his attorney's request, claimant saw Ernest R. Schlachter, M.D., on two occasions--the first in July 1994 and the second in January 1995. Dr. Schlachter diagnosed overuse syndrome of both upper extremities with bilateral medial and lateral epicondylitis; right carpal tunnel syndrome, previously operated; and status following excision of a foreign body mass on the left wrist. He believes claimant has sustained a 15 percent functional impairment to the right upper extremity and 10 percent to the left due to overuse syndrome and carpal tunnel syndrome, which equates to a 15 percent functional impairment to the body as whole, and an additional 5 percent functional impairment to the left upper extremity due to surgical excision of the cystic mass. Additionally, he believes claimant should observe permanent work restrictions of no pushing, pulling, twisting or grasping with either arm or hand more than six times per hour; no vibratory tools; no work in cold environments; and no lifting greater than 20 pounds one time an hour or repetitively lifting greater than 10 pounds more than six times per hour.

Based upon the above evidence, the Administrative Law Judge found that claimant was entitled to permanent partial disability benefits based upon an 11 percent functional impairment rating. The Appeals Board agrees with that finding. The crux of the issue is whether claimant could perform the job of deburring within his permanent work restrictions. Dr. Jones testified that deburring should not be a problem if claimant did not use power equipment. Further, the evidence does not indicate the deburring job would violate Dr. Schlachter's restrictions. The evidence seems to indicate that deburring required light pressure and, therefore, very little physical effort to perform. From the entire record, the Appeals Board finds the respondent accommodated claimant's restrictions and limitations and provided him work paying a comparable wage. When claimant refused to attempt to perform the light duty job, the respondent placed him on medical leave.

The Appeals Board finds claimant is entitled to permanent partial disability benefits for injury to both upper extremities for an injury occurring on October 23, 1993, claimant's last day of work before having surgery. This is based upon claimant's testimony regarding bilateral arm injury, coupled with the testimony of Dr. Schlachter and Dr. Jones regarding their diagnoses. Because his is an "unscheduled" injury, claimant's right to permanent partial disability benefits is governed by K.S.A. 44-510e(a), which reads in pertinent part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In

any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury."

The Appeals Board finds claimant voluntarily removed himself from the accommodated position provided by the respondent and, therefore, the rationale of Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995), should apply. In that case, the Court of Appeals held that a worker should not be allowed to manipulate the computation of work disability by refusing to work at a comparable wage. Although the Foulk case dealt with the computation of work disability for accidents occurring before July 1, 1993, the same rationale should apply for injuries occurring after that date. Therefore, the Appeals Board finds claimant is able to earn 90 percent or more of the average gross weekly wage that he was earning at the time of the injury and, thus, is not entitled to receive permanent partial general disability compensation in excess of his functional impairment rating.

The Appeals Board adopts the Administrative Law Judge's finding that claimant has sustained an 11 percent functional impairment to the whole body as a result of his bilateral upper extremity injuries.

(2) The Administrative Law Judge found that the respondent was responsible for the entirety of this Award. The Appeals Board agrees. Based upon the facts presented, the claimant sustained only one series of repetitive micro-traumas beginning June 1993 that culminated in permanent injury and accident on October 23, 1993. Before June 1993 the claimant was neither impaired nor handicapped. Therefore, the Appeals Board finds the Workers Compensation Fund has no liability in this proceeding.

(3) The Appeals Board notes that claimant initially alleged in Docket No. 186,953 an accident date of July 19, 1993 through October 23, 1993. Respondent subsequently filed an Application for Hearing alleging an accident date of November 23, 1994 which the Division filed as Docket No. 198,379. At the regular hearing held on April 18, 1995, claimant amended the alleged date of accident in Docket No. 186,953 to include an alleged period of accident from October 14, 1994 to January 21, 1995. At the time of the amendment, claimant's attorney stated he was amending the date of accident because claimant had returned to work during that period.

Although the Administrative Law Judge did not make any specific finding regarding the October 1994 to January 1995 period of alleged accident, the Appeals Board finds the evidence fails to establish that it is more probably true than not true that claimant sustained a work-related accident or injury during that period.

Because of this finding, the Appeals Board finds claimant is not entitled to workers compensation benefits in Docket No. 186,953 for an injury which allegedly occurred between October 14, 1994 and January 21, 1995. Further, the Appeals Board finds claimant is not entitled to workers compensation benefits in Docket No. 198,379 for an injury which allegedly occurred on November 23, 1994.

(4) The Appeals Board adopts the findings and conclusions of the Administrative Law Judge that are not inconsistent with those specifically set forth herein.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated August 7, 1995, should be, and hereby is, affirmed; that claimant is entitled to the benefits as awarded by the Administrative Law Judge in Docket No. 186,953; and that claimant is denied benefits in Docket No. 198,379.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James B. Zongker, Wichita, KS  
Eric K. Kuhn, Wichita, KS  
James R. Roth, Wichita, KS  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director